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Constitutional Law

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IV. Construction of Constitutions [§§ 60–108]

D. Construction to Determine Operative Effect [§§ 95–108]

2. As Self-Executing or Not Self-Executing [§§ 98–108]

a. In General [§§ 98–101]

Topic Summary Correlation Table References

§ 98. Generally

A constitution is usually a declaration of principles of the fundamental law, many of its provisions being only commands to the legislature to enact laws to carry out the purposes of the framers of the constitution or mere restrictions upon the power of the legislature to pass laws.^[46] However, it is entirely within the power of those who establish and adopt the constitution to make any of its provisions self-executing,^[47] that is, operative without any necessity for further legislation.^[48]

Criteria which may be relevant in determining whether a constitutional provision is self-executing or not include a description of the right in detail, such as the means for its enjoyment and protection; the absence of any directive to the legislature for further action; a particularly informative legislative history as to the provision's intended operation; a consistency of self-execution with the scheme of rights established in the constitution as a whole.^[49]

Observation:

Even without the benefit of a declaration that they are self-executing, constitutional provisions in Bills of Rights and those merely declaratory of the common law are usually considered self-executing, as are provisions which specifically prohibit particular conduct.^[50]

A clear distinction exists between the questions whether a constitutional provision is mandatory or directory and whether it is self-executing or requires legislation in order to give it effect.^[51] A provision may be mandatory without being self-executing,^[52] and a provision may be self-executing even though it contains some mandatory language.^[53]

^[FN46] *State ex rel. Stephan v. Finney*, 254 Kan. 632, 867 P.2d 1034 (1994); *Kraus v. City of Cleveland*, 42 Ohio Op. 490, 58 Ohio L. Abs. 353, 94 N.E.2d 814 (C.P. 1950), decree aff'd by, 89 Ohio App. 504, 46

Ohio Op. 132, 58 Ohio L. Abs. 360, 96 N.E.2d 314 (8th Dist. Cuyahoga County 1950), appeal dismissed, 155 Ohio St. 98, 44 Ohio Op. 103, 97 N.E.2d 549 (1951).

[FN47] Rosc v. State, 19 Cal. 2d 713, 123 P.2d 505 (1942); Birdsey v. Wesleyan College, 211 Ga. 583, 87 S.E.2d 378 (1955) (criticized in, Vulcan Materials Co. v. Griffith, 215 Ga. 811, 114 S.E.2d 29 (1960)); State ex rel. Stephan v. Finney, 254 Kan. 632, 867 P.2d 1034 (1994); Kraus v. City of Cleveland, 155 Ohio St. 98, 44 Ohio Op. 103, 97 N.E.2d 549 (1951); O'Neill v. White, 343 Pa. 96, 22 A.2d 25 (1941).

A constitutional amendment, as much as a provision in the main body of the constitution itself, may be self-executing. Downs v. City of Birmingham, 240 Ala. 177, 198 So. 231 (1940).

[FN48] § 99.

[FN49] Shields v. Gerhart, 163 Vt. 219, 658 A.2d 924 (1995).

[FN50] Robb v. Shockoe Slip Foundation, 228 Va. 678, 324 S.E.2d 674 (1985).

[FN51] State v. South Dakota Rural Credits Board, 45 S.D. 619, 189 N.W. 704 (1922).

As to whether a constitutional provision is mandatory or directory, generally, see §§ 95- 97.

[FN52] Leser v. Lowenstein, 129 Md. 244, 98 A. 712 (1916); State v. South Dakota Rural Credits Board, 45 S.D. 619, 189 N.W. 704 (1922).

[FN53] In re Larsen, 655 A.2d 239 (Pa. Ct. Jud. Discipline 1994) (a state constitutional amendment creating the Judicial Conduct Board and Court of Judicial Discipline, and requiring the Board and the Court to adopt their own rules of procedure, is self-executing, despite mandatory language therein requiring the Board and the Court to establish rules; however, the failure to promulgate rules cannot operate to deprive either the Board or the Court of their constitutionally granted jurisdiction).

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